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Mohd Azhari bin Aziz v Shanmugam a/l Muniyandi

HIGH COURT (MUAR) — ORIGINATING SUMMONS NO 24(L)–75 OF 2003

B JEFFREY TAN J
21 JUNE 2006

C *Land Law — Caveat — Application to remove private caveat — Whether there was oral agreement for sale entered into between the registered proprietor and the respondent — Whether there was serious questions to be tried — Whether there are special circumstances shown on why the caveat should be removed and not left in existence — Balance of convenience — National Land Code 1965 s 327*

D

This was the applicant's application under s 327 of the National Land Code 1965 to remove the respondents private caveat relating to land held under HS(M) 1461 PTD 2631, Mukim Bandar, Daerah Muar, Negeri Johor ('the said land'). The applicant entered into an agreement to purchase the said land together with the house erected
E thereon. He executed a charge of the said land in favour of RHB Bank. His solicitors presented the charge for registration. The registering authority informed his solicitors that registration of the charge had been rejected by reason of the existence of the respondent's private caveat ('the caveat'). The applicant contended that the caveat was entered for the reason that the registered proprietor/vendor had not returned the
F deposit paid by the respondent that the respondent had no caveatable interest in the said land that the applicant had obtained approval for the transfer from the approving authority that he was a bona fide purchaser without notice that he had paid the total purchase price, that he was aggrieved by the existence of the caveat, that the respondent had not entered into any agreement of sale with the registered
G proprietor/vendor, that the caveat was entered without basis, that the respondent had only a monetary claim, that the failure by the respondent to institute a civil claim evinced that the respondent had no earnest claim, and that the balance of convenience is in favour of the removal of the caveat. The respondent submitted that the respondent had lodged a claim for specific performance of the oral agreement for sale entered into between the registered proprietor and the respondent, that the
H respondent was equally a purchaser of the said land, that the respondent had a caveatable interest, and that the respondent was first to lodge a caveat.

Held, dismissing the application:

I (1) The registered proprietor had not answered the respondent and the version of the respondent was the only version before the court. Therefore it would not seem right to summarily dismiss the claim of the respondent. Paradoxically, it would seem that the failure by the registered proprietor to answer the action and the caveat had given prima facie plausibility to the alleged oral agreement

to merit further investigation and consideration. Given so, the claim of the respondent could not be as baseless or frivolous as should be deprived of a chance of a trial (see para 15).

(2) No special circumstances have been shown why the caveat should be removed and not left in existence. Furthermore, the applicant omitted to say that he was the architect of his own misfortune. The caveat was registered on 10 October 2001 and it served to give notice to the world at large of the respondent's adverse claim to the said land. A search at the land registry would have revealed the existence of the caveat. The applicant could not have paid the balance purchase price before the registration of the caveat (see para 17).

(3) The applicant had not demonstrated that he had purchased the land in good faith without notice of the adverse claim of the respondent. In contrast, the respondent had done all prudent to protect his interest. The respondent was the one first in filing a caveat and was therefore entitled to priority in the absence of fraud. He also promptly appointed solicitors to defend this application. And within reasonable time after service of this application, the respondent had filed his action against the registered proprietor. All things considered, the balance was decidedly in favour of the continuation of the caveat (see para 17).

[Bahasa Malaysia summary

Ini merupakan permohonan pemohon dibawah s 327 Kanun Tanah Negara untuk membuang kaveat persendirian responden berhubung dengan tanah yang dipeganag dibawah HS (M) 1461 PTD 2631, Mukim Bandar, Daerah Muar, Negeri Johor ('tanah tersebut'). Pemohon telah memasuki satu perjanjian untuk membeli tanah tersebut bersama-sama dengan rumah yang dibina diatasnya. Beliau telah memeterai satu gadaian keatas tanah tersebut yang memihak kepada RHB Bank. Peguamcaranya telah mengemukakan gadaian tersebut untuk pendaftaran. Pihak berkuasa mendaftar memberitahu peguamcaranya yang pendaftran gadaian tersebut ditolak kerana terdapat kaveat persendirian respondent ('kaveat tersebut'). Pemohon mendakwa bahawa kaveat tersebut dimasukkan kerana pemegang berdaftar/penjual belum lagi memulangkan deposit yang dibayar oleh responden bahawa responden tidak mempunyai sebarang hak kaveat ke atas tanah tersebut, bahawa pemohon telah mendapat kebenaran untuk pindahmilik dari pihak berkuasa, bahawa beliau adalah pembeli bona fide tanpa notis, bahawa beliau telah membayar penuh harga jualan, bahawa beliau terkilan dengan kewujudan kaveat tersebut, bahawa responden belum memasuki sebarang perjanjian jualbeli dengan pemegang berdaftar/penjual, bahawa kaveat tersebut dimasuki tanpa asas, bahawa responden hanya mempunyai hak tuntutan kewangan, bahawa kegagalan responden untuk memulakan tuntutan sivil menunjukkan bahawa responden tidak mempunyai tuntutan yang benar dan imbangan kemudahan memihak kepada pembuangan kaveat tersebut. Responden menghujahkan bahawa beliau telah memasukkan satu tuntutan untuk pelaksanaan spesifik perjanjian lisan jualan di antara tuanpunya berdaftar dan responden, bahawa responden juga adalah pembeli tanah tersebut, bahawa responden mepunyai kepentingan yang boleh dikaveatkan dan bahawa responden merupakan orang pertama memasukkan kaveat.

Diputusan, menolak permohonan:

(1) Tuanpunya berdaftar tidak menjawab responden dan versi responen adalah satu-satunya versi yang ada dihadapan mahkamah. Oleh yang demikian ianya tidak wajar untuk menolak terus tuntutan responden. Sebaliknya, ianya tampak bahawa kegagalan tuanpunya berdaftar untuk menjawab tindakan ini dan kaveat tersebut telah memberikan prima facie munasabah kepada perjanjian lisan yang dikatakan itu untuk diberi siasatan lanjut dan pertimbangan. Dari itu, tuntutan responden tidaklah tiada berasas atau remeh yang tidak wajar diberi peluang untuk dibicarakan (lihat perenggan 15).

(2) Tidak ada keadaan-keadaan yang istimewa yang dibuktikan kenapa kaveat tersebut wajar dibuang dan tidak wajar dibiarkan terus wujud. Selanjutnya, pemohon gagal untuk menyatakan bahawa beliau sendirinya yang menyebabkan nasib malang ini. Kaveat tersebut didaftarkan pada 10 Oktober 2001 dan ianya bertujuan untuk memberi notis umum mengenai tuntutan responden terhadap tanah tersebut. Satu carian di pejabat tanah tentunya akan menunjukkan kewujudan kaveat tersebut. Pemohon tidak mungkin membayar baki harga belian sebelum pendaftaran kaveat tersebut (lihat perenggan 17).

(3) Pemohon tidak menunjukkan yang beliau telah membeli tanah tersebut dengan suci hati tanpa notis mengenai tuntutan responden. Sebaliknya, responden telah melakukan segala yang wajar untuk memelihara kepentingannya. Responden adalah yang pertama memfailkan kaveat dan dari itu berhak untuk diutamakan pada ketiadaan fraud. Beliau juga telah dengan segera melantik peguamcara untuk membela permohonan ini. Dan dalam masa yang munasabah selepas serahan permohonan ini, responden telah memfailkan tindakannya terhadap tuanpunya berdaftar. Setelah dipertimbangkan kesemuanya, imbangan diputuskan memihak kepada kaveat tersebut dikekalkan (lihat perenggan 17).]

Notes

For cases on caveats generally, see 8(2) *Mallal's Digest* (4th Ed, 2006 reissue) paras 2152–2156.

Cases referred to

Aik Ming (M) Sdn Bhd v Chang Ching Chuen & Ors [1995] 2 MLJ 770 (refd)
Alwee v Lai Kong Fook & Ors [1980] 2 MLJ 258 (refd)
American Cyanamid v Ethicon Ltd [1975] 1 All ER 504 (refd)
Caxton (Kelang) Sdn Bhd v Susan Joan Labrooy [1988] 2 MLJ 604 (refd)
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)
Drulroad Pty Ltd v Gibson (1992) NSW Conv R 55–637 (refd)
Eng Mee Yong v Letchumanan [1979] 2 MLJ 212 (refd)
Goh Paik Swan v Ng Choo Lum [1996] 3 MLJ 437 (refd)
Gunawan Iron & Steel Sdn Bhd v Associated Pan Malaysia Cement Sdn Bhd [2002] 7 MLJ 1 (refd)
Holee Holdings (M) Sdn Bhd v Chai Him & Ors [1997] 4 MLJ 601 (refd)
Itam binti Saad v Chik binti Abdullah [1974] 2 MLJ 53
KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd [1994] 2 MLJ 201 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng [1995] 1 MLJ 719 (refd)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53 (refd)
Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors [1986] 1 MLJ 315 (refd)
Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782 (refd)
Murugasu v Michael Ching Ngian Fong [1978] 1 MLJ 23 (refd)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145 (refd)
Saad v Chik binti Abdullah [1974] 2 MLJ 53 (refd)
Soon Seng Co Sdn Bhd v Toko Palayakat Jamal (M) Sdn Bhd [1999] 5 MLJ 75 (refd)
Susur Rotan Mining Ltd v Siow Wong Fatt & anor [1965] 2 MLJ 45 (refd)
Tan Heng Poh v Tan Boon Thong & Ors [1992] 2 MLJ 1 (refd)
Tan Kiong Hwa, Re [1972] 1 MLJ 239 (refd)
United Malayan Banking Corporation Bhd v Development and Commercial Bank (Ltd) Bhd [1983] 1 MLJ 165 (refd)
Wu Shu Shen v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (refd)

Legislation referred to
National Land Code 1965 ss 323, 324(3), 326, 327(1)

Hezeyana bt Hamdani (Hazelin & Associates) for the appellant.
MK Nijar (Nijar & Nijar) for the respondent.

Jeffrey Tan J:

[1] This is the applicant's application (encl 2 dated 27 January 2004) under s 327 of the National Land Code 1965 to remove the respondent's private caveat (No Perserahan 1542/2001) restraining the registration of dealings on the register document of title relating to land held under HS(M) 1461 PTD 2631, Mukim Bandar, Daerah Muar, Negeri Johor (hereinafter referred to as the said land).

[2] In his affidavits (encls 3 and 10), the applicant put forth the following 'facts'. On 25 May 2001, he entered into an agreement (encl 3 exh MAA-1) to purchase the said land together with the house erected thereon. On 6 March 2002, he executed a charge of the said land in favour of the RHB Bank. On 29 November 2002, his solicitors presented the charge for registration. On 22 January 2003, the registering authority informed his solicitors (see encl 3 exh MAA-3) that registration of the charge had been rejected by reason of the existence of the respondent's private caveat (caveat). In those same affidavits, the applicant contended that the caveat was entered for the reason that the registered proprietor/vendor had not returned the deposit paid by the respondent that the respondent has no caveatable interest in the said land, that he (applicant) had obtained approval for the transfer from the approving authority that he (applicant) is a bona fide purchaser without notice, that he had paid the total purchase price [of RM39,000], that he (applicant) is aggrieved by the existence of the caveat, that the respondent had not entered into any agreement of sale with the registered proprietor/vendor, that the caveat was entered without basis, that the respondent has only a monetary claim, that the failure by the respondent to institute a civil claim evinced that the respondent has no earnest claim, and that the balance of convenience is in favour of the removal of the caveat.

[3] In her short submission, Miss Hezeyana bte Hamdani for the applicant submitted that the applicant has paid the full purchase price and is therefore the beneficial owner of the said land, that the claim of the respondent is monetary in nature, that the respondent has no caveatable interest, and that the respondent has not raised any serious issues to be tried.

[4] In his affidavits (encls 10 and 14), the respondent contended that 'saya mempunyai kepentingan di dalam tanah tersebut. Pemilik tanah tersebut telah menjualnya kepada saya dan saya telah membayarnya wang deposit sebanyak RM3,000 kepadanya. Adalah dipersetujui diantara kami bahawa baki harga tanah tersebut akan dibayar apabila tanah tersebut dipindah milik kepada saya. Sehingga kini pemilik gagal/enggan/abai memindahkan tanah tersebut kepada saya … saya telah failkan kaveat ke atas tanah pada 10 Oktober 2001' and that the applicant's agreement of sale has lapsed, that he has lodged a claim (Muar High Court 22–8–2004 see encl 14 exh SM-1) against the registered proprietor.

[5] In her equally short submission, Miss Manjit Kaur Nijar for the respondent submitted that the respondent had lodged a claim for specific performance of the oral agreement for sale entered between the registered proprietor and the respondent, that the respondent is equally a purchaser of the said land, that the respondent has a caveatable interest and that the respondent was first to lodge a caveat.

[6] One issue that was raised by the respondent in his affidavits was that the applicant has no 'locus standi di dalam perkara ini' (see encl 14 para 3). But that issue was not argued by the counsel for the respondent who had probably accepted the fact that on the deposed facts the applicant was evidently 'a person who has a tangible interest in obtaining the order which is usually referred to as 'standing' or ' locus standi' (see *Caxton (Kelang) Sdn Bhd v Susan Joan Labroov* [1988] 2 MLJ 604, per Siti Norma Yaakob J, as she then was). In point of fact, the applicant was unquestionably a person aggrieved by the existence of the caveat, within the meaning of s 327(1) of the National Land Code 1965. The applicant could not be not hard done by for it was on account of the existence of the caveat (see encl 3 exh MAA-3) that registration of the transfer from the registered proprietor to the applicant and registration of the charge by the applicant in favour of the RHB had been rejected. There should be no question about it. The interest of the applicant was affected by the existence of the caveat (see *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487. The applicant, being prevented by the existence of the caveat to have his dealing registered on the document of title is an aggrieved person (see *United Malayan Banking Corporation Bhd v Development and Commercial Bank (Ltd) Bhd* [1983] 1 MLJ 165 where it was held by the Federal Court per Wan Sulaiman FJ that a chargee who is prevented by a caveat to have the certificate of sale registered is an aggrieved body; see also

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, where it was held by the Federal Court per Ali FJ that an aggrieved person in the context of s 327 of the National Land Code 1965 is one who is prevented by a caveat from dealing with his right or interest in the land). As a person aggrieved, the applicant was entitled to apply to have the said private caveat removed.

[7] And the caveat would be removed, unless the respondent could show that there are sufficient grounds in fact and law for its continuance.

[8] Lord Diplock in*Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212 thus expressed the onus upon the caveator in an application for the removal of a caveat:

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried: and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

[9] Gopal Sri Ram JCA in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 thus narrated the stages through which an application for the removal of a caveat must go:

> In my judgment, there are three stages through which an inquiry of this nature must go. The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are *insufficient in law* to support a caveat, then *cadit quaestio,* and the caveat must be removed without the necessity of going any further.
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> *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJU 113, illustrates how the issue of caveatability may be concluded at the first stage. There, the vendor of land sold and transferred it to a purchaser. Part of the purchase price was to be settled by the re-transfer of certain odd lots that were included in the sale. The striking feature of the case is that the relevant deed of assignment under which the re-transfer was to take place expressly made provision for the vendor to enter a private caveat. Such a caveat having been entered on the ground, inter alia, that the full purchase price had not been paid, the purchaser applied under s 327(1) for its removal. The High Court ordered the removal and an appeal by the vendor to the Federal Court failed.
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> Hashim Yeop A Sani FJ (later CJ (Malaya)) stated the proposition (at p 115) in language unrivalled for its clarity:
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> > To put it more simply, *the caveator in this case must first satisfy the court that he has a 'caveatable interest' in the land.* Only if he has such an interest can he qualify to lodge a caveat under s 323 of the National Land Code. In the application to have the caveat removed the onus is cast upon the caveator to satisfy the court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and after having done so he must go on to show that on the balance of convenience the caveat should be extended until the disposal of the main action (Emphasis added).
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> At p 116 of the report he added:
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> > Thus it is plain that the appellant claimed to have the right to lodge the caveat but based on cl 4(a) of the deed of assignment. It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. The contractual provision does not create an interest within the meaning of s 323 of the National Land Code. *Interests which are protectable by caveat are only interests recognized by the Code.* The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge private caveat.

> They are person or body claiming title to any alienated land or claiming any registrable interest in any alienated land or claiming any right to such title or interest and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words 'any right to such title or interest' may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not wide enough to cover mere personal rights as distinguished from rights relating to land (see also *David Wong, Land Tenure in the Malay States* at pp 416–435) (Emphasis added.)

Another illustration is afforded by the facts of *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1 which concerned the interest of a beneficiary under a will. Although the correctness of this decision in another respect is not relevant for present purposes, it has been called into question and effectively reversed (see *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345, it remains as authority for the proposition that a beneficiary under a will has no caveatable interest until his testator's estate has been fully administered.

The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case.

At this second stage the court is more concerned with matters of evidence and proof offered to support the caveator's claim. *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 affords a good illustration. The caveator in that case alleged that the registered proprietor of certain property had sold it to him under a written agreement. There had been an offer and a counter offer followed by discussions on a draft written agreement in which one of the clauses had, at the instance of the vendor, been deleted. As a result of those discussions, an engrossed agreement executed by the caveator was sent to the vendor's solicitors together with a cheque for 10% of the purchase price. The letter under cover of which these were sent stated that the deposit was not to be returned until after the vendor had executed the agreement. Three months later, the vendor's solicitors wrote saying that the vendor could not agree with some of the terms in the written agreement. A caveat was entered by the purchaser. The vendor applied under s 326 of the Code, to the land administrator who issued a notice to the caveator to show cause why the caveat ought not to be removed. The caveator applied to the court to have the caveat extended. Mahadev Shankar J (as he then was) dismissed the application after undertaking a careful examination of the evidence adduced to support the existence of a serious question to be tried. He held that on the evidence presented to him there was no concluded contract.

Although that case was decided under s 326, the approach adopted applies to an application made under s 327(1) and we entertain no doubt whatsoever that Mahadev Shankar J was right in the approach he took. The case illustrates the proposition that, although a caveator may, in his application for the entry of a caveat, show a prima facie caveatable interest in the property in question, he may fail to adduce satisfactory evidence at the hearing of the application for its removal so that the judge would be entitled to hold that the claim in support of the caveat has not been made out and therefore there is no serious question to be tried.

The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* as 'the balance of convenience.' As to the matters that go to determine in which direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary.

It is only upon satisfying these three stages of curial scrutiny that a caveat may be permitted to remain. That this should be so is only logical; for it is a serious matter to caveat a person's

property and unless a case is properly made out, a caveat ought not to be permitted to remain on the register a moment longer than is absolutely necessary.

[10] Kamalanathan Ratnam J in *Soon Seng Co Sdn Bhd v Toko Palayakat Jamal (M) Sdn Bhd* [1999] 5 MLJ 75 abridged those three stages, albeit interspersed with his Lordship's own observations, as follows:

In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, the Court of Appeal set three stages for this court to consider before ordering the removal of a caveat. First, the court is to examine the caveat itself, that is, to look into Form 19B and the reasons stated therein for imposing the caveat. If no caveatable interest has been shown, the caveat ought to be removed without the need to consider the remaining two stages. If Form 19B shows a caveatable interest, the court then moves on to the second stage. The second stage is when an aggrieved party applies to remove the caveat. The court then examines the affidavit evidence of the caveator to find out if the evidence supports the caveatable interest claimed in the Form 19B or shows that the claim to a caveatable interest raises a serious issue to be tried. The court is to examine the evidence in detail and closely. If the evidence does not support the claim to a caveatable interest or that there is a serious issue to be tried on this point, the court is to remove the caveat without going to the third stage. Once the first two stages are satisfied, then the court must decide as a third stage, where the balance of convenience lies. It must be noted that at the second stage the caveator is not allowed to justify the retention of the caveat on a ground different from that set out in his Form 19B and the court is required to subject the caveator's affidavit evidence in support of the caveatable interest to "meticulous scrutiny' (see *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437). In *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, the Court of Appeal held that the caveator must show an enforceable contract to have a caveatable interest. In *Wu Shu Chen,* the caveat was removed because the caveator had merely stated in Form 19B that they had a caveatable interest 'by virtue of certain document' which they did not exhibit. Mokhtar Sidin JCA said at p 503:

As can be seen in the said para 2 above, Goh had not disclosed what that so-called 'certain document' was. He chose to hide it from the world at large and it was as good as having nothing at all to show the caveatable interest he or Mingshu Syndicate claimed. He failed to disclose the instrument of trust in his caveat. Any person making a search on his caveat application form would have no notice of what the claim could be.

[11] In the case of the instant Form 19B (Application for Entry of a Private caveat), it was accompanied by the following grounds verified by a statutory declaration of the respondent.

Abdullah bin Ibrahim (K/P No 491011–01–5347) adalah pemilik tanah yang dikenali sebagai HSM 1461 PTD 2631 Mukim Bandar Maharani, Muar, Johore. Beliau telah bersetuju untuk menjual tanah tersebut kepada saya. Di atas tanah berkenaan terdapat sebuah rumah kos rendah.

Sebagai bayaran pendahuluan deposit, saya telah membayar wang sebanyak RM3,000 kepada Abdullah bin Ibrahim. Adalah dipersetujui di antara kami bahawa baki wang jual beli akan saya jelaskan selepas tanah berkenaan dipindahmilik ke atas nama saya.

Walaubagaimanapun sehingga kini, Abdullah bin Ibrahim telah gagal enggan/abai memindahmilikkan tanah tersebut kepada saya.

Adalah perlu untuk saya menfailkan kaveat agar dapat menjaga hak/kepentingan saya ke atas tanah berkenaan.

[12] In short, the stated ground for the application for entry of the caveat was that the registered proprietor had agreed to sell and the respondent had agreed to purchase the said land. As purchaser, the respondent fell within the definition of a person claiming title to the land and at whose instance a private caveat may be entered. Evidently, on the basis of the claim as expressed, the respondent had a caveatable interest, for his claim was for an interest that was registrable (see *Luggage Distributors* and the authorities referred thereto (see also*Gunawan Iron & Steel Sdn Bhd v Associated Pan Malaysia Cement Sdn Bhd* [2002] 7 MLJ 1 where Nik Hashim J (as he then was), perspicaciously observed that 'a caveatable interest should be an interest that is registrable') when he lodged the said private caveat.

[13] An agreement of sale was not disclosed in Form 19B or in the affidavits of the respondent. But in his affidavit dated 14 April 2004 (encl 14), the respondent disclosed by exhibiting his writ (aforesaid Muar High Court 22–8–2004) and statement of claim, that his claim for specific performance against the registered proprietor was founded on an oral agreement entered on 25 September 2000. In paras 3 and 4 of his statement of claim, the respondent pleaded as follows:

> Pada 25 September 2000, plaintif telah memasuki satu perjanjian jual-beli secara lisan dengan defendan berkenaan dengan tanah tersebut untuk harga jual-beli sebanyak RM22,000. Plaintif telah jelaskan wang sebanyak RM3,000 kepada defendan dan adalah dipersetujui bahawa baki harga jual-beli sebanyak RM19,000 akan dijelaskan apabila tanah dipindahkan daripada defendan kepada plaintif.
>
> Sehingga kini, defendan telah gagal/enggan/abai memindahkan tanah tersebut kepada plaintif.
>
> Plaintif pada semua masa yang material bersedia, mampu dan ingin menyempurnakan perjanjian 25 September 2000.

[14] One fact could be deemed agreed, namely that there was no written agreement. Otherwise, it was a stand off. While the applicant contended that there was no agreement for sale, the respondent contended that there was an oral agreement. But that dispute should not be resolved on affidavits. The dictum of Lord Diplock in *American Cyanamid v Ethicon Ltd* [1975] 1 All ER 504 at p 510 was that 'it's in no part of the court's function at this stage of the litigation' — that is in considering a motion for an interlocutory injunction — 'to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration'.

[15] In relation to proceedings brought under s 327(1) of the National Land Code 1965, Lord Diplock, in *Eng Mee Yong* at p 217, notably said:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he 'may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first

> instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under s 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong …

One could be sceptical of an alleged oral agreement. After all, it is all too easy to lay claim to an oral agreement. Nevertheless, it remained that it was not for the applicant to say that the respondent had no agreement of sale. Whether there was an oral agreement is a matter only within the personal knowledge of the registered proprietor and respondent. And that issue should be resolved by trial (see *Alwee v Lai Kong Fook & Ors* [1980] 2 MLJ 258, *Murugasu v Michael Ching Ngian Fong* [1978] 1 MLJ 23, Itam binti *Saad v Chik binti Abdullah* [1974] 2 MLJ 53, *Susur Rotan Mining Ltd v Siow Wong Fatt & Anor* [1965] 2 MLJ 45, each an action for specific performance of alleged oral agreement for sale of land that was disposed by a full trial). It is for the registered proprietor to say that there was no oral agreement. But alas, the registered proprietor has not come forward to resist the claim of the respondent. The stated address of the registered proprietor in the written agreement exhibited by the applicant (see encl 3 exh MAA-1) was 57–3 Lorong Dato' Ahmad, Jalan Khalidi 84000 Muar. According to the documents filed in Muar 22–8–2004 which, the respondent had in manner approved by order of court dated 8 July 2004, duly served his writ of summons (Muar 22 August 2004 filed on 7–4–2004), that is, by the posting of a copy of the writ of summons at 57–3 Lorong Dato' Ahmad, Jalan Khalidi 84000 Muar and by an advertisement in a newspaper (*Berita Harian*), on the registered proprietor on 28 September 2004. But to date, the registered proprietor has not entered an appearance or taken any other steps to defend the action. Likewise, in the case of the instant caveat that was registered as far back as 10 October 2001, and it could be reasonably assumed that notification of that caveat would have been served (see s 324(3) of the National Land Code 1965), the registered proprietor has not applied to have the caveat removed. The point is that if the claim of the respondent were that frivolous or vexatious, then why has the registered proprietor not resisted the action (Muar 22–8–2004) or the caveat? And if the claim of the respondent were so lacking in truth, then why has the registered proprietor not said so? Yes, one could doubt the existence of an alleged oral agreement. But under the present circumstances, where the registered proprietor has not answered the respondent and the version of the respondent is the only version before the court, it would not seem right to summarily dismiss the claim of the respondent. Paradoxically, it would seem that the failure by the registered proprietor to answer the action and the caveat has given prima facie plausibility to the alleged oral agreement to merit further investigation and consideration. And given so, the claim of the respondent could not be as baseless or frivolous as should be deprived of a chance of a trial. But of course, at this stage, the respondent need not show that his action will ultimately succeed (*Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53; see also Eng Mee Yong at 215). The respondent need only to show, and it has been shown, that there is a serious question to be tried. And that serious question would be rendered academic if the caveat were to be summarily removed, for once the applicant's transfer is registered, the respondent's registrable interest, if any, is destroyed.

[16] On matters that determine the preservation or otherwise of the status quo, Lord Diplock, in *Eng Mee Yong* at p 215, imparted as follows:

> In the case of a refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the caveator under s 327 for removal of a caveat, once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.

[17] Suffice it to say, that no special circumstances have been shown why the caveat should be removed and not left in existence. The applicant complained that he had obtained approval for the transfer, that he is a bona fide purchaser without notice, that he has paid the total purchase price of RM39,000, and that he is aggrieved by the existence of the caveat. But the applicant omitted to say that he was the architect of his own misfortune. The caveat was registered on 10 October 2001, and it served to give notice to the world at large of the respondent's adverse claim to the said land (see *Aik Ming (M) Sdn Bhd v Chang Ching Chuen & Ors* [1995] 2 MLJ 770). A search at the land registry would have revealed the existence of the caveat. But it begs the question as to whether a search was conducted in the first place, as the following unchallenged facts gave away that the applicant could not have paid the balance purchase before the registration of the caveat. On 25 May 2001, the applicant entered into the agreement and paid what must be a nominal deposit of RM1,800 towards the purchase price. The agreement stipulated that the balance sum of RM37,200 shall be paid within four months from 2 May 2001. What transpired in the interim was not disclosed, but on 12 December 2001 the applicant was informed that the loan to finance his purchase of the said land had been approved. That would mean that the loan could not have been released before 12 December 2001. On 10 January 2002, the RHB registered its private caveat (Pers 49/2002) on the document of title. On 6 March 2002, the applicant executed a charge of the said land in favour of the RHB Bank. Then on 29 November 2002, the applicant's solicitors presented the charge for registration. Prudent banking practice would have dictated that the loan could not be released until some sort of security of the RHB had been first secured. That would mean that the loan would not have been released before 10 January 2002 or 6 March 2002 or 29 November 2002. At any rate, the applicant would only have been in a position to settle the balance purchase price after the caveat had been registered on 10 October 2001. Consequently, the applicant could only have paid the total purchase price after the caveat had been registered on 10 October 2001. The applicant would have paid the full purchase in the face of the caveat which he had constructive notice (see *Holee Holdings (M) Sdn Bhd v Chai Him & Ors* [1997] 4 MLJ 601, where it was held by Augustine Paul JC (as he then was) that 'a caveat is constructive notice of the interest claimed to a person who ought to have searched the title: see *Drulroad Pty Ltd v Gibson* (1992) NSW Conv R 55–637';

for an analogy, see also *KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd* [1994] 2 MLJ 201, where it was held by Mohamed Dzaiddin SCJ., as he then was, that as Form 49 of the Companies Act 1965 is a public document, the common law doctrine of constructive notice applies). Quite clearly, the applicant had not demonstrated that he had purchased the land in good faith without notice of the adverse claim of the respondent. In contrast, the respondent had done all prudent to protect his interest. The respondent was the 'one first in filing a caveat and is therefore entitled to priority in the absence of fraud' (see *Re Tan Kiong Hwa* [1972] 1 MLJ 239 , p 241, per Chua J). He promptly appointed solicitors to defend this application. And within reasonable time after service of this application, the respondent had filed his action against the registered proprietor. All things considered, the balance is decidedly in favour of the continuation of the caveat.

This application is therefore dismissed with costs.

Application dismissed.

Reported by Peter Ling